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NO. 61779-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEE H. ROUSSO,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Revised Code of Washington specifically prohibits individuals within the State of Washington from knowingly using electronic means of communication, including the Internet, to conduct gambling activities. RCW 9.46.240. It does so through a non-discriminatory, blanket prohibition that applies to all electronic gambling communications, regardless of whether the communications are intrastate, interstate, or international in nature.

Congress and the federal courts have long recognized that gambling is an issue of local concern subject to regulation and control by the individual states through the exercise of their police powers. In fact, Washington's prohibition against unpermitted gambling activity is specifically articulated in its own state constitution and has been since that document was originally ratified. *See* Washington State Const. art. II, § 24. As a consequence, Congress has repeatedly and consistently adopted legislation designed to enhance and complement state criminal laws governing gambling and repeatedly declined to exercise its power under the Commerce Clause to pre-empt state gambling laws. Whether viewed singularly or as a whole, the existing federal gambling statutes, which universally recognize and preserve the exercise of the states' police powers, confirm that gambling is an activity that does not require uniform

regulation and control throughout the nation and, accordingly, is not a matter that is subject to challenge under the dormant Commerce Clause.

Even if dormant Commerce Clause analysis did apply to this matter, the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), would clearly be satisfied, as RCW 9.46.240 does not discriminate against out-of-state interests and does not unduly interfere with interstate commerce. In summary, Appellant Rousso cannot meet his required burden of proving that RCW 9.46.240 is unconstitutional beyond a reasonable doubt. For all of these reasons, this Court should reject Rousso's dormant Commerce Clause challenge and affirm the trial court's ruling granting summary judgment in favor of the State.

II. RESTATEMENT OF THE ISSUES

1. Has Congress expressed an intent not to pre-empt state gambling laws, like RCW 9.46.240, by adopting criminal gambling laws, including the Wire Act, 18 U.S.C. § 1084, and the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361 *et seq.*, that predicate federal criminal liability upon violations of state gambling laws?

2. Is the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, applicable when Congress has determined that uniform regulation of the interstate commerce related to the gambling industry is unnecessary?

3. Assuming for the sake of argument that the dormant Commerce Clause is applicable, does RCW 9.46.240's complete prohibition of all Internet gambling impermissibly discriminate against interstate (or international) commerce?

4. Do the substantial local interests advanced by RCW 9.46.240 outweigh any incidental burdens it may impose on interstate (or international) commerce?

III. RESTATEMENT OF THE CASE

A. Washington's Gambling Laws

1. Article II, section 24.

Washington's people, legislature and courts have long recognized that gambling is a social and economic evil that the Legislature has plenary authority to prohibit or strictly limit. Washington State Const. art. II, § 24;[1] RCW 9.46.010; *State ex rel. Schafer v. Spokane*, 109 Wash. 360, 362-63, 186 Pac. 864 (1920) (quoting *Ex Parte Dickey*, 76 W.Va. 576, 85 S.E. 781 (1915)); *Northwest Greyhound Kennel Ass'n, Inc. v. State,* 8 Wn. App. 314, 320, 506 P.2d 878, *review denied,* 82 Wn.2d 1004 (1973). As

[1] Reference to article II, § 24 of the State Constitution is notably absent from Rousso's history of gambling regulation in Washington. As a consequence, Rousso fails to recognize that the regulation of gambling in Washington State is of a constitutional dimension that provides the Legislature with broad discretion to regulate or even prohibit gambling activities. *See Northwest Greyhound Kennel*, 8 Wn. App. at 321 (declining to rule on constitutionality of Horse Racing Act because courts should not answer "what is primarily a political question in an area of almost complete legislative discretion and in an area vitally affecting public safety and morals").

initially adopted in 1889, article II, § 24 of the State Constitution banned all gambling by providing, *in toto*, that: "The legislature shall never authorize any lottery or grant any divorce." The Washington State Supreme Court subsequently, and repeatedly, made clear that the term "lottery," as used in the Constitution, encompassed all forms of gambling activities. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 152, 247 P.2d 787 (1952). Moreover, the Court early on made it unmistakably clear that this constitutional prohibition was absolute: "The language of the constitution is mandatory, and the provision is self-executing." *City of Seattle v. Chin Let*, 19 Wash. 38, 40, 52 Pac. 324 (1898) (holding that even lotteries conducted for charitable purposes are forbidden).

It was not until 1972 that the electorate voted to amend article II, § 24 to its present form. It currently provides:

> The legislature shall never grant any divorce. **Lotteries shall be prohibited except as specifically authorized** upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

(Emphasis added). One year later, the Legislature enacted the Gambling Act, Chapter 9.46 RCW, which for the first time permitted some

specifically limited forms of gambling activities under highly regulated circumstances.

2. The Gambling Act, RCW 9.46.

The Gambling Act advances the following two-fold policy: (1) to keep the criminal element out of gambling; and, (2) to promote the social welfare by "limiting the nature and scope of gambling activities and by strict regulation and control." RCW 9.46.010. Continuing, RCW 9.46.010 sets forth the following declaration of purpose:

> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling . . . .

Id. In furtherance of these policies and goals, the Legislature directed that "[a]ll factors incident to the activities authorized in [the Act] shall be closely controlled, and the provisions of [the Act] shall be liberally construed to achieve such end." *Id.*

3. RCW 9.46.240's prohibition against the knowing receipt or transmission of gambling information.

RCW 9.46.240 prohibits the knowing transmission or receipt of "gambling information" through any electronic communication medium, including the Internet. To ensure the broadest possible prohibition, and in

anticipation of unforeseen technological advancements like the Internet, the original drafters set forth a non-exclusive list of communication media to illustrate the proscribed conduct. Before 2006, RCW 9.46.240 provided:

> Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, **or similar means**, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a gross misdemeanor subject to the penalty set forth in RCW 9A.20.021[.]

Former RCW 9.46.240 (2005) (emphasis added). In 2006, the Legislature added "the internet" to this illustrative list, further clarifying that the proscription extended to activities on the World Wide Web. Substitute Senate Bill 6613, Laws of 2006, ch. 209, § 2 (SSB 6613), Attached Appendix A. *See* CP[2] 368 (Final Bill Report). At the same time, the Legislature increased the penalty for violating RCW 9.46.240 from a gross misdemeanor to a Class C felony. *Id.* These amendments took effect on June 7, 2006. *Id.*

Understanding the full scope of conduct proscribed by RCW 9.46.240 also requires reference to the specific statutory definitions

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[2] The abbreviation "CP" refers to the Clerks Papers that have been designated by the parties and forwarded to this Court for review. "RP" refers to the transcript of the superior court's May 15, 2008 oral ruling. "OARP" refers to the transcript of the oral argument before the superior court on that same day.

of "gambling," "gambling information," and "professional gambler." RCW 9.46.0237 defines "gambling" as:

> staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.

Among other things, RCW 9.46.269 defines "professional gambling" as follows:

> 1) A person is engaged in "professional gambling" for the purposes of this chapter when:
> . . .
> (b) Acting other than in a manner authorized by this chapter, the person pays a fee to participate in a card game, contest of chance, lottery, or other gambling activity[.]

Finally, RCW 9.46.0245 defines "gambling information" as:

> any wager made in the course of and any information intended to be used for professional gambling. In the application of this definition, information as to wagers, betting odds and changes in betting odds shall be presumed to be intended for use in professional gambling. This section shall not apply to newspapers of general circulation or commercial radio and television stations licensed by the federal communications commission.

Importantly, RCW 9.46.0245's second sentence regarding activities presumed to be used for professional gambling uncouples the term "gambling" from the term "information" and is consistent with the reference to "any information" that appears in the first sentence of the statute. Together, these two sentences demonstrate the Legislature's

conscious design not to incorporate the elements of the definition of "gambling" into RCW 9.46.0245. By doing so, the Legislature expressed an intent that RCW 9.46.0245 reach, define, and proscribe activities that do not necessarily contain all three of the elements[3] of gambling found in RCW 9.46.0237. RCW 9.46.0245's definition of "gambling information," in turn, is incorporated into RCW 9.46.240. As a result, RCW 9.46.240 flatly prohibits any attempt to knowingly import or supply "gambling information," as specifically defined by RCW 9.46.0245, even if a completed act of "gambling" is prevented or otherwise does not occur.

B. Factual History.

Because this case was decided below on summary judgment, and solely for the purposes of this appeal, the following facts are assumed to be true. Rousso asserts that, prior to June 7, 2006 – the effective date of SSB 6613 – he used his personal computer at his home to regularly play poker on an Internet poker website known as Pokerstars.[4] CP 373-74 (Interrog. Nos. 5, 6). Rousso received Internet services from Comcast through a cable connection. CP 382.

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[3] The elements of gambling are frequently described in the following terms: "consideration," "chance," and "prize." *See Bullseye Distributing LLC v. Gambling Comm'n,* 127 Wn. App. 231, 238, 110 P.3d 1162 (2005); RCW 9.46.0237.

[4] Although the Complaint alleges that Rousso engaged in a variety of different Internet gambling activities, including fantasy baseball, "March Madness" brackets, and reality TV pools, Rousso admitted in his responses to written discovery that he was not relying upon any of these activities to establish standing. CP 376-77 (Interrog. Nos. 13-15).

Rousso accessed Pokerstars by downloading software from Pokerstars' website, selecting a username and password, and funding a gambling account through a debit card issued by a major United States bank.[5] CP 385 (Interrog. No. 5). During the time in question, Rousso typically played tournament poker, where players play against one another to win a pool of money or a prize. *Id.* Rousso frequently played more than one game at a time on his home computer. CP 385 (Interrog. No. 6). Pokerstars charged Rousso and his fellow players a ten percent fee to enter these poker tournaments.[6] *Id.*

Rousso contends that he has played poker with individuals located in other states and other countries, but cannot provide their identities because players on Pokerstars are only identified by a pseudonym or "handle." CP 375-76, 386 (Interrog No. 11). During discovery, Rousso refused to disclose the pseudonym he used on Pokerstars. CP 372 (Interrog. No. 3).

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[5] Rousso refused to produce any corroborating evidence regarding these activities in response to the State's discovery requests. CP 370-89.

[6] The only independent documentation Rousso has produced regarding his Internet poker playing is an email he claims to have received from Pokerstars indicating that he won a seat at the "World Series of Poker" tournament in Las Vegas as a prize in an Internet poker tournament. CP 382.

C. Procedural History.

1. Trial Court Proceedings.

On or about July 6, 2007, Rousso commenced this action by filing a complaint seeking relief under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24. CP 3-11. The Complaint alleged that RCW 9.46.240 violated (1) the United States Constitution, Art. I, Section 8, Cl. 3 (the Commerce Clause), (2) the U.S. Constitution's Amendment VIII prohibition against cruel and unusual punishment (the Eighth Amendment), and (3) the due process clause of the U.S. Constitution's XIV Amendment (the Fourteenth Amendment). CP 8-10. The State filed its Answer on August 3, 2007, alleging that the Complaint failed to state a claim upon which relief may be granted and that Rousso lacked standing under the UDJA. CP 15.

Rousso filed a Motion for Declaratory Judgment on February 29, 2006, arguing that RCW 9.46.240 violates the dormant commerce clause and constitutes cruel and unusual punishment under the Eighth Amendment. CP 17-39. Rousso did not pursue the void for vagueness challenge under the Fourteenth Amendment, or the commerce clause claims based on allegations that RCW 9.46.240 conflicted with federal law, and subsequently abandoned his Eighth Amendment claim prior to oral argument. CP 204; OARP 13. *See* Appellant's Brief at 4, n.12.

2. The Trial Court's Ruling.

On May 15, 2008, the Superior Court heard oral argument on Rousso's Motion for Summary Judgment and the State's Cross-Motion for Summary Judgment. RP 1-7; OARP 1-36. Afterwards, the Superior Court, ruling from the bench, concluded that there were no issues of material fact preventing issuance of a ruling as a matter of law, granted the State's Cross-Motion for Summary Judgment, and, accordingly, denied Rousso's motion. CP 207-209; RP 6.

In its oral ruling, the Superior Court declined to adopt the State's position that Congress, through its passage of numerous federal gambling statutes, including the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5361 *et seq.*, had expressly recognized that gambling was an issue of local concern and, therefore, that dormant Commerce Clause analysis was not applicable to this matter. RP 5-6. Nonetheless, the Superior Court did find that the statute was not facially protectionist or discriminatory, and, therefore, did not violate the Commerce Clause on its face. RP 4. Applying the *Pike* balancing test, the Court further held that the statute advanced a legitimate interest of local concern and that any burden imposed on interstate commerce was merely incidental. RP 4-5. Accordingly, the Court entered an Order granting the State's Cross-Motion for Summary Judgment and denying Rousso's motion. CP 207-

209. On June 2, 2008, Rousso filed a timely Notice of Appeal with the Washington State Court of Appeals, Division One. CP 210-11.

IV. ARGUMENT

A. Standard of Review.

Summary judgment motions are decided as a matter of law, and appellate review of a summary judgment is *de novo*. CR 56; *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is appropriate when the facts and all reasonable inferences from those facts, viewed in the light most favorable to the non-moving party, establish that there are no genuine issues of material fact and, therefore, the case can be decided as a matter of law. *Id.*

A statute is presumed constitutional, "and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt." *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001). Put another way, to prevail a claimant must demonstrate that there is no reasonable doubt that the statute is unconstitutional. *Id.*

B. RCW 9.46.240 complements federal criminal laws governing gambling and interstate commerce and, therefore, comports with the Commerce Clause.

The Commerce Clause grants Congress the "power . . . [t]o regulate commerce with foreign nations, and among the several states." U.S. Const. art. I, § 8, cl. 3. "Implicit in this affirmative grant is the

negative or 'dormant' Commerce Clause – the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce." *Heckel*, 143 Wn.2d at 832.

When Congress chooses to regulate in a particular area, however, state laws authorized by Congressional legislation "are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc., v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 174, 105 S. Ct. 2545, 86 L. Ed. 2d 112 (1985).

> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the tax or regulation under the Commerce Clause in the absence of congressional action. **Courts are final arbiters under the Commerce Clause only when Congress has not acted.**

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (emphasis added).

When Congress criminally proscribes certain types of interstate commerce, it "has determined that that commerce is not in the public interest" and, therefore, "it does not offend the purpose of the Commerce Clause for states to discriminate or burden that commerce." *Pic-A-State PA, Inc. v. Pennsylvania (Pic-A-State I)*, 42 F.3d 175, 179-80 (3d Cir. 1994), *cert. denied*, 517 U.S. 1246 (1996) (holding that a Pennsylvania

law prohibiting the sale of interests in out-of-state lottery tickets within state boundaries does not violate the Commerce Clause); *L.E. Services, Inc. v. State Lottery Comm'n of Indiana*, 646 N.E.2d 334, 345-47 (Ind. Ct. App. 1995) (holding that Indiana anti-gambling laws do not violate Commerce Clause). In such instances, courts apply a two part inquiry, "asking **(1) whether federal law precludes all state legislation in that area,** and **(2) if state regulation is not precluded, whether the state statute conflicts with the federal provision.**" *Pic-A-State I*, 42 F.3d at 180 (citing *California v. Zook*, 336 U.S. 725, 733, 69 S. Ct. 841, 93 L. Ed. 1005 (1949); *Asbell v. Kansas*, 209 U.S. 251, 255-56, 28 S. Ct. 485, 52 L. Ed. 778 (1908)) (emphasis added).

The *Pic-A-State I* case, which involved a dormant Commerce Clause challenge to Pennsylvania's criminal prohibition against the sale of interests in out-of-state lotteries, is particularly instructive in this regard. Pic-A-State developed a system whereby, for a fee, it would purchase interests in out-of-state lottery tickets on behalf of its customers. *Id.* at 176-77. Because Pic-A-State retained custody of the lottery tickets in the state in which they were issued, Pic-A-State was able to avoid liability under federal criminal laws prohibiting the transport of lottery tickets across state lines.

In response, the Pennsylvania legislature passed a law criminally prohibiting sales of interests in out-of-state lottery tickets within Pennsylvania's borders. *Id.* at 177. Shortly thereafter, the federal government passed a law prohibiting businesses like Pic-A-State from procuring for persons in one state an interest in a lottery conducted by another state, unless the subject states entered into a compact allowing for those types of transactions. *Id.* at 178.

On appeal, the Third Circuit easily concluded that the federal act did not pre-empt Pennsylvania's law. More importantly, the Third Circuit ruled that the dormant Commerce Clause was not applicable because Congress had spoken on the issue, thereby establishing that uniform regulation of interstate commerce relative to the sale of interests in lottery tickets was not of national concern. In doing so the Third Circuit concluded that the state law satisfied Commerce Clause scrutiny because the federal law did not preclude state regulation in this area and because Pennsylvania's law complemented, as opposed to conflicted with, the federal law. *Id.* at 180.

1. Congress has expressly authorized states to regulate gambling and, therefore, state gambling laws, like RCW 9.46.240, are not precluded by federal law.

Gambling is an issue of local concern subject to regulation through the exercise of local police powers. "Under our federal system, the 'States

possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 560 n.3, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). This is particularly true when it comes to gambling.

> Courts have . . . recognized that a state has a "paramount interest in the health, welfare, safety, and morals of its citizens." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999). And because "[t]he regulation of lotteries, betting, poker and other games of chance touch upon all of the above aspects of the quality of life of state citizens" the regulation of gambling "lies at the heart of the state's police power." *Id.*

Helton v. Hunt, 330 F.3d 242, 246 (4th Cir. 2003). *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) (gambling "implicates no constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been, banned all together"). Recognizing that the regulation of gambling is an area of local concern, Congress has passed numerous criminal laws for the stated purpose of enhancing state gambling regulations and assisting with their enforcement.[7] Two of these laws, the

[7] The Unlawful Internet Gambling Enforcement Act of 2006 (the UIGEA), 31 U.S.C. § 5361 *et seq.*, discussed below, is only the latest federal law in which Congress has taken steps to ensure that federal laws governing gambling do not pre-empt state law. For example, when adopting 18 U.S.C. § 1511, which criminally prohibits conspiracies to obstruct the enforcement of state gambling laws, Congress found:

Wire Act, 18 U.S.C. § 1084 and the Unlawful Internet Gambling Enforcement Act of 2006 (the UIGEA), 31 U.S.C. § 5361 *et seq.*, are of particular interest here.

The adoption of the UIGEA in October 2006 – nearly contemporaneous with the Legislature's adoption of SB 6613 – clearly establishes Congress' determination that gambling over the Internet is not a type of commerce requiring nationwide uniformity in regulation. The UIGEA regulates Internet gambling by prohibiting financial institutions from processing financial transactions, like credit card payments, related to "unlawful Internet gambling." 31 U.S.C. § 5363. More importantly, it defines "unlawful Internet gambling" to mean "to place, receive or

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> No provision of this title indicates an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of a State or possession, or a political subdivision of a State or possession, on the same subject matter, or to relieve any person of any obligation imposed by any law of any State or possession, or political subdivision of a State or possession.

Act October 15, 1970, P.L. 91-452, Title VIII, Part A, § 801, 84 Stat. 936.

Congress has consistently expressed similar deference to state police powers in other gambling related statutes. *See* 15 U.S.C. §1172(a) (criminalizing interstate transport of slot machines into states that prohibit slot machine gambling); the Interstate Horseracing Act, 15 U.S.C.§ 3001(a)(1) (finding that "the States should have primary responsibility for determining what forms of gambling may legally take place within their borders"); the Travel Act, 18 U.S.C. § 1952 (prohibiting use of interstate travel or the U.S. Mail to facilitate violations of state gambling laws); the Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953(c) ("Nothing contained in this Act shall create immunity from criminal prosecution under any laws of any State . . .."); the Illegal Gambling Business Act, 18 U.S.C. § 1955 (violation of state or local gambling law necessary element establishing violation of Act); the Racketeer Influenced and Corrupt Business Act (RICO), 18 U.S.C. §§ 1963, 1964 (prohibiting racketeering activities that include felony violations of state gambling laws or violations of federal gambling laws).

otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager **is unlawful under any applicable** Federal or **State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.**" 31 U.S.C. § 5362 (10)(A) (emphasis added). Thus, a violation of a state gambling law, like RCW 9.46.240, is a predicate offense necessary to prove a violation of the UIGEA. *See Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979) (federal criminal law which uses other state and federal laws to establish predicate offenses makes "it clear beyond a reasonable doubt that Congress intended to add a second layer of enforcement supplementing what it found to be inadequate state authority and state enforcement"). Any doubt regarding Congress' intent to endorse and enhance state gambling regulations is resolved by 31 U.S.C. § 5361(b) which provides that "[n]o provision [of the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."

Congress' adoption of the Wire Act is another instance in which it affirmatively determined that enhancement of state gambling laws should take precedence over nationwide uniformity of gambling regulations. The Wire Act, like RCW 9.46.240, prohibits the knowing use of a

communication facility to transmit interstate or foreign wagering information.[8] It provides in relevant part:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placement of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years or both.

18 U.S.C. § 1084(a). Congress' stated purpose in adopting the Wire Act was two-fold:

> (1) **to assist the various States** and the District of Columbia **in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses** and [(2)] to aid

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[8] Rousso suggests that the Wire Act's proscription is limited to sports betting. *See* Aplt's Br. at 2 n.1. Both a ruling from New York State and a recent decision from the United States District Court for the District of Utah, however, have found otherwise. *New York v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 714 N.Y.S. 2d 844, 848, 850-52 (N.Y. Sup. Ct. 1999) (holding that Internet gambling casino operation violated the Wire Act); *United States v. Lombardo,* 2007 WL 4404641 (D. Utah December 13, 2007) (holding that the application of the Wire Act "is not confined entirely to wire communications related to sports betting or wagering"). The Fifth Circuit has held that the Wire Act is limited to sports wagering. *In re Mastercard Int'l Inc.,* 313 F.3d 257, 262-63 (5th Cir. 2002). In *Lombardo*, however, the district court subsequently distinguished *Mastercard* on the basis that it involved civil RICO claims, as opposed to criminal charges, and that the Fifth Circuit's summary analysis of the Wire Act appeared to be driven by its belief that the plaintiff gamblers, who were seeking to avoid their own gambling debts through the RICO action, "got exactly what they bargained for". *Lombardo* at 6. Based on a careful examination of § 1084's language, the *Lombardo* court concluded that the phrase "sporting event or contest" modified only the first of three uses of wire communications listed in the Act. *Id.* The court also noted that this interpretation of the Act was consistent with the Tenth Circuit's *Criminal Pattern Jury Instructions. Id.* at 7. In any event, the Wire Act is merely one of numerous federal laws passed by Congress for the purpose of enhancing and assisting with the enforcement of state gambling laws. *See* fn.7, *supra.*

> in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.

United States v. McDonough, 835 F.2d 1103, 1105 n.7 (5th Cir. 1988) (quoting legislative history). Once again, Congress chose to enhance local regulation of gambling, as opposed to imposing a nationwide uniform standard.

Through its adoption of the Wire Act and the UIGEA, Congress has recognized longstanding precedent establishing that gambling is primarily an issue of local concern subject to the regulation by local police powers. Rather than pre-empt state regulation of gambling in favor of a uniform national standard, Congress has chosen to use its Commerce Clause powers to enhance state regulation of Internet gambling and assist in the enforcement of state laws, like RCW 9.46.240.[9] Federal law does not preclude states from regulating Internet gambling to the extent that such activities occur within their own borders.

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[9] *World Interactive Gaming Corp.*, 714 N.Y.S.2d at 851, is instructive. In that case, New York's attorney general sought to enjoin a New York corporation from selling stock in an Internet casino belonging to the corporation's wholly owned subsidiary headquartered in Antigua. In its analysis, the Court found that transactions regarding the Internet casino not only violated New York state gambling law, but also violated the federal Wire Act, the Travel Act and the Paraphernalia Act. In doing so, the court summarily rejected World's contention that "the federal government has not explicitly ruled on Internet gambling, and therefore it is an unregulated field." *Id.* at 852.

2. RCW 9.46.240 does not conflict with federal laws criminalizing Internet gambling and, therefore, complies with the Commerce Clause.

RCW 9.46.240 and other similar state statutes have been endorsed by Congress through the passage of the UIGEA, the Wire Act and other federal gambling statutes. By making violations of state gambling laws, like RCW 9.46.240, predicate offenses to violation of the Wire Act and the UIGEA, Congress has expressly endorsed state regulation in this area and authorized the states to prohibit and/or regulate Internet gambling regardless of the impact such regulations may have on interstate commerce. *See Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294, 1304 (3d Cir.), *cert. denied,* 517 U.S. 1246 (1996) (*Pic-A-State II)* (Congress has authority to enact interstate gambling regulation to supplement state law enforcement authority, even when the legislation enables states to discriminate against out-of-state lottery). Consequently, RCW 9.46.240 does not conflict with any federal gambling laws. Under such circumstances, no additional analysis is necessary. RCW 9.46.240 complies with the Commerce Clause.

C. Even if the dormant Commerce Clause applies, Washington's regulation of Internet gambling is constitutionally appropriate.

As discussed above, Congress has concluded that its appropriate role with regard to interstate commerce and gambling is to enhance and to assist with state regulation of state gambling laws, rather than preclude

states from regulating in this area. Under such circumstances, the dormant Commerce Clause analysis set forth in *Pike v. Bruce Church,* 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), simply has no application. *Pic-A-State I,* 42 F.3d at 179-80; *L.E. Services,* 646 N.E.2d at 345-47. That said, some courts, when confronted with Commerce Clause challenges to state gambling regulations, have, nonetheless, felt compelled to conduct the dormant Commerce Clause analysis set forth in *Pike. See, e.g., Winshare Club of Canada v. Dep't of Legal Affairs*, 542 So.2d 974, 975 (Fla. 1989) (applying *Pike* balancing test while at the same time noting that federal laws governing the interstate sales of lottery tickets provide states with great latitude over the in-state sale of lottery tickets). Assuming for the sake of argument that *Pike* applies, RCW 9.46.240 still meets constitutional muster.

Pike stands for the following proposition: "Where [a state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld [against a dormant commerce clause challenge], unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Typically, the *Pike* analysis is divided into two steps. The first inquiry is whether the challenged law "facially regulates or discriminates against interstate commerce, or has the direct

effect of favoring in-state economic interests over out-of-state interests." *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 110, 63 P.2d 779 (2003). If the statute survives this first step, the court then performs a balancing test where the local interests advanced by the statute are weighed against the burden, if any, the statute may impose upon interstate commerce. *Heckel*, 143 Wn.2d at 832-33. RCW 9.46.240 easily satisfies both tests.

1. RCW 9.46.240's comprehensive ban against knowing transmission or receipt of gambling information regulates in-state and out-of-state economic interests with an even-hand and does not discriminate against interstate commerce.

RCW 9.46.240 satisfies the first inquiry under *Pike* because it regulates Internet gambling in an even-handed way. That statutory provision prohibits all knowing transmission or receipt of gambling information over the Internet in the state of Washington, regardless of whether this conduct takes place as part of intrastate or interstate communications. Because RCW 9.46.240 regulates Internet gambling in a non-discriminatory and evenhanded fashion, it does not trigger heightened scrutiny under the dormant Commerce Clause. *See Heckel*, 143 Wn.2d at 833 (holding that law providing that "no person" shall send proscribed commercial email to a computer located in Washington is not facially discriminatory because it has equal application to both in-state and out-of-

state parties). *See also Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 718, 153 P.3d 846 (2007) (wage and hours law that is facially non-discriminatory and treats in-state and out-of-state economic interests evenhandedly satisfies first dormant Commerce Clause inquiry); *Momb v. Ragone*, 132 Wn. App. 70, 82, 130 P.3d 406 (2006) (Washington's parental relocation statutes do not facially discriminate against interstate commerce and, therefore, withstand dormant commerce clause challenge). Like the "anti-spam" statute at issue in *Heckel*, RCW 9.46.240 prohibits **all** knowing transmission or receipt of gambling information, regardless of whether the communication involves intrastate or interstate commerce. Accordingly, it is non-discriminatory and, therefore, is not subject to strict scrutiny.

Rousso argues that RCW 9.46.240 is *per se* invalid because it favors in-state, brick and mortar gambling over Internet gambling. Aplt's Br. at 22. He further argues that the State's imposition of an evenhanded ban on all Internet gambling necessarily discriminates against out-of-state interests because the only Internet gambling websites he is aware of are located outside of Washington State. *See id.* at n.29. The comparison, however, is one between apples and oranges.

To establish discrimination, one must establish dissimilar treatment of similarly situated economic interests. In Washington, the only legal

gambling is bricks-and-mortar gambling, all of which is authorized by the legislature, as required by Article II, § 24 of the State Constitution, and closely controlled and regulated by the Washington State Gambling Commission pursuant to the Gambling Act, RCW 9.46. The economic interests of heavily regulated brick-and-mortar casinos are fundamentally different from those of unregulated Internet casinos, regardless of their location. RCW 9.46.240 effectively prohibits all Internet gambling within Washington State, regardless of whether the communications are sent to or emanate from an in-state or out-of-state website. If the Washington Legislature adopted legislation giving in-state brick and mortar gambling some type of economic advantage over brick-and-mortar gambling in a neighboring state, such a law might be found to be invalid because it would not regulate inter- and intra- state commerce with an even hand. In comparison, RCW 9.46.240 prohibits all Internet gambling in Washington State, regardless of whether the Internet casino is located in Spokane, Minneapolis, or Antigua. A complete prohibition, such as this, does not favor in-state economic interests over similarly situated out-of-state economic interests. Accordingly, it is non-discriminatory and passes muster under the dormant Commerce Clause.

2. RCW 9.46.240 effectuates a legitimate local public interest.

a. The State has a substantial local public interest in regulating all gambling within its borders.

Even if it were necessary for the Court to proceed to the second inquiry under *Pike,* RCW 9.46.240 would satisfy that standard as well. Washington's constitution, the Legislature, and its courts have long recognized the social and economic problems that accompany gambling. *See* Const. art. II, § 24 (prohibiting all lotteries, except when approved by a supermajority of the legislature or the electorate); RCW 9.46.010 (recognizing that gambling has a close relationship to organized crime and that close regulation and control of gambling promotes the social welfare); *State ex rel. Schafer v. Spokane*, 109 Wash. 360, 363, 186 Pac. 864 (1920) (gambling is a social and economic evil over which the Legislature has broad powers to prohibit or suppress); *Northwest Greyhound Kennel Ass'n, Inc. v. State,* 8 Wn. App. 314, 506 P.2d 878, *review denied*, 82 Wn.2d 1004 (1973) (same); *State v. Gedarro*, 19 Wn. App. 826, 579 P.2d 949, *review denied*, 90 Wn.2d 1023 (1978) ("Underlying the gambling act, and consonant with the legislative recognition that professional gambling is interrelated with organized crime, are policies which attempt to restrain personal profits realized through professional gambling activities and to

discourage participation in such activities").[10] Given that Washington State has either completely outlawed or strictly controlled gambling since its inception as a state, there can be no doubt that the regulation of gambling in Washington is an issue of long-standing and substantial local public interest.

Nor is this local public interest in gambling merely one of historical happenstance. As recently as 2005, the Legislature passed Engrossed Substitute House Bill 1031, Laws of 2005, Ch. 369, § 1 (ESHB 1031), which addressed problem and pathological gambling and made the following findings regarding undesirable social and economic impacts that arise from gambling:

> (a) The costs to society of problem and pathological gambling[11] include family disintegration, criminal activity, and financial insolvency;

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[10] Washington is not unique in this regard. State and Federal courts throughout the United States have repeatedly recognized that state regulation and control of gambling is consistent with a state's "paramount interest in the health, welfare, safety, and morals of its citizens." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999). "The regulation of lotteries, betting, poker and other games of chance touch upon all of the above aspects of the quality of life of state citizens" the regulation of gambling "lies at the heart of the state's police power." *Id. See Doumani v. Casino Control Comm'n of N.J.*, 614 F. Supp. 1465, 1473-74 (1985) (state has "strong interest" in strict regulation of the gambling industry); *Winshare Club,* 542 So.2d at 975 (gambling is "a matter of peculiarly local concern that traditionally has been left to the regulation of the states").

[11] RCW 43.20A.890 defines "pathological gambling" as "a mental disorder characterized by loss of control over gambling, progression in preoccupation with gambling and in obtaining money to gamble, and continuation of gambling despite adverse consequences." "Problem gambling" is defined as "an earlier stage of pathological gambling which compromises, disrupts, or damages family or personal relationships or vocational pursuits." *Id.*

(b) Problem and pathological gamblers suffer a higher incidence of addictive disorders such as alcohol and substance abuse;

(c) Residents of Washington have the opportunity to participate in a variety of legal gambling activities operated by the state, by federally recognized tribes, and by private businesses and nonprofit organizations; and

(d) A 1999 study found that five percent of adult Washington residents and eight percent of adolescents could be classified as problem gamblers during their lifetimes, and that more than one percent of adults have been afflicted with pathological gambling.[12]

Id. (footnotes added). CP 97.

And the cost of preventing and treating pathological and problem gambling is only the tip of the iceberg:

> Problem and pathological gambling affects not only the problem and pathological gambler and his or her family but also broader society. Such costs include unemployment benefits, welfare benefits, physical and mental health problems, theft, embezzlement, bankruptcy, suicide, domestic violence, and child abuse and neglect.

The Nat'l Gambling Impact Study Comm'n (NGISC), Executive Summary, June 18, 1999; CP 615.[13] Given the far-reaching social impacts and costs

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[12] *See* Rachel A. Volberg, Ph.D. & W. Lamar Moore M.S., *Gambling and Problem Gambling Among Adolescents in Washington State: A Replication Study, 1993 to 1999* (June 25, 1999) and Volberg & Moore, *Gambling and Problem Gambling in Washington State: A Replication Study, 1992 to 1998* (May 11, 1999). CP 396-587.

[13] The National Gambling Impact Study Act, Public Law 104-169 104th Congress, created the National Gambling Impact and Policy Commission and directed the Commission to conduct hearings on gambling issues and issue a report of its findings to the President, Congress, State Governors, and Native American Indian tribes. The enabling legislation and excerpts from Commission's 1999 Report and Executive Summary are at CP 610-745.

associated with gambling, Washington State has a substantial local public interest in restricting and regulating gambling through the Gambling Act and its related criminal prohibitions, including RCW 9.46.240.

b. The State has a substantial local public interest in regulating Internet gambling within its borders.

Internet gambling has never been authorized under the Washington State Constitution or The Gambling Act. Article II, § 24 expressly prohibits all gambling activities except those that have been specifically authorized by a super-majority of the state legislature or the electorate. Without such authorization, residents of Washington State have always been constitutionally barred from gambling on the Internet.

Setting the constitutional bar aside, Internet gambling poses many regulatory challenges and risks that are not present in the strictly regulated and controlled "brick and mortar" gambling operations that are legal in Washington State.[14] Washington's gambling laws are based on a licensing model that requires all entities operating gambling businesses and, in many instances, their individual employees, to subject themselves to close

[14] Instead of setting forth in the Appellant's Brief his proposed balancing test and stating his objections to the State's position regarding the dangers posed by Internet gambling, Rousso refers the Court to arguments that appear in his declaratory judgment briefing before the Superior Court. Aplt's Br. at 26 and n.31. These arguments should be disregarded as issues that are not supported by reasoned written appellate argument, including arguments incorporated by reference into the appellate brief, are considered abandoned on appeal. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998); RAP 10.3(a)(5).

state regulation. Among other things, these regulations require that (1) all gambling operations be licensed and all license applicants be subject to criminal background checks;[15] (2) gambling licensees submit to inspections of their books, premises, and gambling equipment to ensure compliance with state laws designed to safeguard the public and prevent criminal infiltration;[16] and (3) gambling licensees adhere to strict accounting standards and submit to audits of their financial records and books to ensure proper payouts, tax payments and to ferret out graft and corruption.[17] Washington's gambling laws also prohibit gambling on credit,[18] limit the hours licensees can operate,[19] prohibit minors and intoxicated persons from gambling, and require casinos to fund problem gambling treatment programs and post warnings regarding problem gambling.[20]

None of the safeguards listed above can be effectively enforced against off-shore Internet gambling operations.

> Unlike brick and mortar casinos, the action of "virtual casinos" and in other forms of online gambling is nonstop

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[15] RCW 9.46.070(1)-(4), (7) & (17). *See* RCW 9.46.160 (operating gambling activity without requisite license punishable as Class B felony).

[16] *See, e.g.,* RCW 9.46.130.

[17] *See, e.g.,* RCW 9.46.070(8), .130, & .140.

[18] WAC 230-06-035.

[19] *See, e.g.,* RCW 9.46.0233(1); WAC 230-15-025; WAC 230-10-100(1).

[20] RCW 9.46.071; WAC 230-06-010, -015; WAC 230-12-250.

and accessible to anyone with Internet access. Bets can be placed anonymously and pseudonymously, regardless of the player's age, sobriety, or finances. Moreover, unlike lawful domestic gambling operations, many Internet gambling sites operate from servers in foreign countries that are unsupervised by U.S. government regulators.

. . .

[M]easured against brick-and-mortar casinos, Internet gambling has a greater potential to exacerbate the abuses associated with addictive or underage gambling and appears to pose a much higher risk to society. The anonymity and ubiquity of Internet gambling, coupled with its reliance on credit cards to foster long-distance betting, increases these risks, particularly given that video gambling devices have been characterized as the most addictive form of gambling. Some call them the "crack cocaine" of the gambling world. When the personal computer becomes a video gambling machine, the problem gambler will confront a powerful temptation in the next room 24 hours a day . . . [A]s Internet gambling grows, society stands to suffer from more gambling addiction.

. . .

By offering gambling in the home at any hour, [Internet gambling] defies time and place restrictions. By allowing gambling by credit card, it allows people to bet, not just to the limit of their wallet or bank account, but to their credit limit. Additionally, Internet gambling operations have no way to screen out minors, drunks, or habituals, all of whom can easily bypass the primitive and *pro forma* safeguards that most sites have available. This raises the prospect of awestruck teenage techno-junkies or their gambling addicted parents pounding the keyboard at un-policed Internet gambling sites twenty-four hours a day. Furthermore, sports gambling, an extremely popular form of gambling on the Internet, has been shown to be the most potentially addicting form for adults and teenagers alike.

Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 Yale L. J. 1569, 1569-70, 1574-75, 1592 (1999) (internal footnotes excluded); CP 106-47.

In addition to these regulatory concerns, Internet gambling, like other forms of unregulated gambling, also provides fertile grounds for criminal activity, including organized crime.

> Internet gambling can provide a nearly undetectable harbor for criminal enterprises.[21] Since Internet "servers" for gambling operations are physically located offshore, dishonest gambling operators can easily steal "winnings" by taking credit card numbers and money from deposited accounts and then, within a matter of minutes, move a gambling site or close it down altogether. Computer hackers can tamper with software and manipulate games to their benefit. And money launderers need only to deposit their money into an offshore account, use the funds to gamble, lose a small percentage of the original funds, then cash out the remaining funds."[22]

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[21] The District Attorney for Queens New York recently announced an indictment of Gambino crime family members involved in an alleged Internet sports gambling ring that operated using "computerized wire rooms in Costa Rica." The press release announcing the indictment provided this description of the Internet gambling operation:

> [L]aw enforcement crackdowns over the years on traditional mob-run wire rooms have led to an increased use by illegal gambling rings of offshore gambling websites where action is available around the clock. Bettors can click on an offshore gambling website over the Internet and be assigned individual login codes and passwords. Their wagers and win-loss amounts are recorded in "subaccounts" maintained by "runners" and "agents" accounts. These gambling websites typically store their information on computer servers outside the United States – often in such Central American countries a Costa Rica – and "bounce" their data through a series of server nodes in efforts to evade law enforcement detection through traditional methods.

CP 747-800.

[22] Members of a terrorist cell in the United Kingdom recently pleaded guilty to using Internet gambling sites to launder large sums of money that were then used to fund

NGISC, Exec. Summary, June 18, 1999; CP 619-20. *See* Jon Mills, *Internet Casinos: A Sure Bet for Money Laundering*, 19 Dick. J. Int'l L. 77 (2000); CP 149-78.

In sum, Internet gambling, like other types of unregulated gambling activities, poses a significant risk to the health, welfare and morals of residents of the state of Washington. The solitary nature of Internet gambling exacerbates many of the problems traditionally associated with face to face gambling activities. The "virtual" nature of Internet casinos allows casino operators to escape financial accountability to their patrons and allows problem gamblers and other incapacitated individuals unlimited access to gambling activities without any restraint or limit, or possibility of intervention. Internet gambling, like other illegal gambling, is a magnet for organized crime, including traditional crime families and international terrorists. For all of these reasons Washington

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terrorist activities. The Washington Post described the money laundering scheme as follows:

> Al-Daour allegedly laundered money through online gambling sites – using accounts set up with stolen credit cards numbers and victims' identities – running up thousand-dollar tabs at sites like AbsolutPoker.com, BetFair.com, BetonGet.com, Canbet.com, Eurobet.com, NoblePoker.com and ParadisePoker.com, among others. All told, al-Daour and other members of the group conducted 350 transactions at 43 different online wagering sites, using more than 130 compromised credit card accounts. It didn't matter if they lost money on their wagering. Winnings were withdrawn and transferred to online bank accounts the men controlled.

CP 802-06.

State has a substantial local public interest in prohibiting gambling on the Internet.

3. Any burden placed upon interstate commerce by RCW 9.46.240 has been endorsed by Congress and, therefore, does not violate the Commerce Clause.

Through its adoption of laws that enhance, rather than preclude, state regulation of gambling, Congress has consistently found that the regulation of gambling is a matter of local concern. In making this choice, Congress has made a policy judgment that uniformity in the laws governing interstate gambling activities is not necessary or required. Under such circumstances, performing the *Pike* balancing test is futile, as there is literally no interstate commerce capable of being burdened. *See Winshare Club,* 542 So.2d at 475 (finding that state statute prohibiting sale of out-of-state lottery tickets satisfies *Pike* balancing test, but also concluding "Congressional enactments on the interstate sales of lottery tickets clearly contemplate that the states may regulate purely internal lottery ticket sales as they see fit" and that "long-standing, highly disparate gambling laws throughout the United States show that uniformity is not required"). Given the substantial local public interest in state regulation of gambling, coupled with the fact that Congress has consistently concluded that uniformity regarding interstate commerce and gambling is unnecessary between the individual states, it is clear that Washington's

interest in regulating gambling over the Internet, as well as any other communication medium proscribed by RCW 9.46.240, is paramount, and any incidental impact RCW 9.46.240 may have on interstate commerce is permissible.

4. Rousso's reliance on *California v. Cabazon Band of Mission Indians* is misplaced.

Rousso cites to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed .2d 244 (1987)[23] for the proposition that there are "judicially imposed limits on the amount of disdain" a state can express toward legalized gambling within its borders and that state governments that legalize gambling must treat the gambling industry the same as they would "any other economic enterprise." Aplt's Br. at 12, 14, 24. Unlike the matters at issue in this case, however, *Cabazon* involves questions regarding the scope of a state's authority to regulate gambling on tribal lands. Congress and the United States Supreme Court have repeatedly recognized that Indian tribes are sovereign entities entitled to special and unique treatment under the laws of the United States.[24] Because of the tribes' unique status within American

[23] The *Cabazon* holding was quickly superceded by statute with Congress' adoption of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq* in October 1988.

[24] In *Morton v. Mancari*, 417 U.S. 535, 554-555, 94 S.Ct. 2474, 2485, 41 L. Ed. 2d 290 (1974), for example, the Supreme Court held that the tribes, due to their status as

jurisprudence, it is inappropriate to rely upon cases, like *Cabazon*, to extrapolate generalized principals of law, as Rousso has attempted to do here. Accordingly, his arguments based upon the holding in *Cabazon* should be disregarded.

5. Rousso's reliance on *American Libraries Ass'n v. Pataki* is misplaced.

Rousso contends that the State's interest in banning Internet gambling is "miniscule" and "the burden on interstate commerce is gigantic." Aplt's Br. at 26. The case upon which Rousso bases this argument, *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (1997), however, is factually distinguishable from the circumstances presented

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sovereign nations, were not subject to traditional equal protection analysis under the federal constitution. In its analysis, the Court observed:

> On numerous occasions [the United States Supreme] Court specifically has upheld legislation that singles out Indians for particular and special treatment. *See, e.g., Board of County Comm'rs v. Seber*, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L. Ed. 2d 129 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209, 86 S.Ct. 1459, 16 L. Ed. 2d 480 (1966), *aff'g* 244 F.Supp. 808 (E.D. Wash.1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed. 2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs). *Cf. Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L. Ed. 2d 270 (1974) (federal welfare benefits for Indians 'on or near' reservations). This unique legal status is of long standing, *see Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse. *See generally* U.S. Dept. of Interior, *Federal Indian Law* (1958); Comment, *The Indian Battle for Self-Determination*, 58 Calif.L.Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

here. Indeed, as discussed in more detail below, the Washington Supreme Court in *Heckel* specifically distinguished the holding in *Pataki* from the Commerce Clause challenge to the anti-spam law. *See Heckel*, 143 Wn.2d at 839-40.

Pataki involved a dormant Commerce Clause challenge to a New York State law that criminally prohibited the distribution of sexually explicit materials to minors over the Internet. In its analysis, the court found that protecting children from indecent materials was "a legitimate and undisputably worthy subject of state regulation." *Pataki*, 969 F. Supp. at 169. Continuing, however, the court concluded that the burden on interstate commerce clearly outweighed any local benefits derived from the law. *Id.* The court buttressed this conclusion with its determination that the Internet involved an area of commerce that "must be marked off as a national preserve to protect users from inconsistent legislation" and, therefore, was the appropriate subject for protection under the dormant Commerce Clause. *Id.*

One critical distinction between *Pataki* and the instant case is the fact that Congress, through its passage of the UIGEA and the Wire Act, has already expressed a position regarding the balance between local gambling regulations and interstate commerce, and has repeatedly and consistently enacted legislation recognizing the validity of state regulation

within this realm. *See* Section VI (B) (1). Having so acted, Congress' position on gambling and interstate commerce is no longer "dormant," which forecloses Rousso's dormant Commerce Clause challenge.

A second critical distinction was identified by the Supreme Court in *Heckel*:

> At issue in *American Libraries* was a New York statute that made it a crime to use a computer to distribute harmful, sexually explicit content to minors. **The statute applied not just to initiation of e-mail messages but to all Internet activity, including the creation of websites.** Thus, under the New York statute, a website creator in California could inadvertently violate the law simply because the site could be viewed in New York. Concerned with the statute's 'chilling effect"[25] . . . the court observed that, if an artist "were located in California and wanted to display his work to a prospective purchaser in Oregon, he could not employ his virtual [Internet] studio to do so without risking prosecution under New York law. . . . In contrast to the New York statute, which could reach all content posted on the Internet and

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[25] This reference to a "chilling effect" suggests that the *Pataki* ruling was concerned that New York's anti-pornography law threatened to violate free expression rights under First Amendment. In contrast, the United States Supreme Court has repeatedly found that commercial speech related to gambling can be lawfully restricted and even prohibited without violating the First Amendment. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986) (upholding Puerto Rico's laws restricting advertisement of gambling against First Amendment challenge; concluding that Puerto Rico Legislature has a substantial governmental interest in the health, safety and welfare of its citizens); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) (federal statutes prohibiting radio broadcast of lottery advertising in non-lottery states meet First Amendment scrutiny; holding that gambling "implicates no constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been, banned all together"). In fact, at least one court has found that a game of chance like Bingo does not constitute a cognizable form of protected speech. *There to Care, Inc. v. Commissioner of Indiana Dep't of Rev.*, 19 F.3d 1165, 1167 (7th Cir. 1994) ("Gambling has traditionally been closely regulated or even forbidden, without anyone suspecting that these restrictions violate the first amendment").

> therefore subject individuals to liability based on unintended access, the Act reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the [Anti-Spam] Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.

143 Wn.2d at 839-40 (emphasis added).

The prohibited activity at issue here – the knowing receipt and transmission of gambling information – is subject to the same analysis as the "anti-spam" law in *Heckel*. In order to engage in Internet gambling, one must download special software on a computer, register as a user, fund a gambling account, and actively engage in Internet gambling. As with the "anti-spam" legislation, Washington's prohibition against knowing receipt and transmission of gambling information does not inadvertently "chill" the exercise of constitutionally protected rights by out-of-state residents. Rather, it prohibits specific conduct – the knowing receipt and transmission of gambling information – that necessarily requires affirmative action by the party committing the offense.[26] Unlike

[26] Rousso's contention in his Motion for Declaratory Judgment that the United States Supreme Court in *Granholm v. Heald,* 544 U.S. 460, 125 S.Ct. 1885, 161 L. Ed. 2d 796 (2005), followed the *Pataki* court's reasoning regarding Internet commerce is not well taken. CP 25. In *Granholm,* the court concluded that Michigan and New York laws that favored in-state wine producers over out-of-state producers violated the dormant Commerce Clause. *Granholm* does not cite *Pataki* and, beyond a passing observation that state bans on interstate direct shipping represent a major impediment to expanded e-commerce in wine, 544 U.S. at 468, the *Granholm* opinion is virtually devoid of any substantive discussion of the Commerce Clause jurisprudence as applied to the Internet.

the anti-pornography statute at issue in *Pataki,* Washington's proscription against Internet gambling does not impose liability to electronic messages routed through the state without any action taken by the viewer.

6. The complete prohibition in RCW 9.46.240 of all Internet gambling does not favor local economic interests over out-of-state economic interests.

Rousso contends that the Legislature adopted SB 6613 to protect the economic interests of the local gambling industry in Washington State, at the expense of out-of-state gambling interests.[27] Aplt's Br. at 22-23. This reasoning is faulty for several reasons. The most obvious distinction is the fact that Internet gambling takes place over the Internet while all authorized gambling activities in Washington, with off-track betting on horse-racing being one minor and easily distinguishable exception, do not.[28]

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[27] In his summary judgment pleadings, Rousso alleged that the Legislature also intended for RCW 9.46.240 to protect the state lottery, horse racing, and tribal casinos from competition by Internet gambling sites. CP 27. In his pleadings before this Court, however, he appears to limit his focus to house-banked card rooms. Aplt's Br. at 2 n.1.

[28] In his superior court briefing, Rousso argued that SB 6613 protected Washington's off-track betting system, which allows bets to be placed over the Internet, from economic competition. CP 23. This analysis, however, ignores several critical issues. First, pari-mutuel betting and handicapping contests authorized under the Washington Horse Racing Act, RCW 67.16, are expressly exempted from Washington's definition of "gambling," and, therefore, fall outside the scope of RCW 9.46.240. *See* RCW 9.46.0237. Second, the interstate wagers made pursuant to the off-track betting system operated by Washington and other states are made possible by the Interstate Horse Racing Act, 15 U.S.C. § 3001 *et seq.* Prior to passage of this Act, Interstate communication of off-track wagers was proscribed by the Wire Act. The Interstate Horse Racing Act created an exemption to this federal proscription, providing that, subject to state law and regulations, a person located in a state that has legal off-track betting can

It is also notable that SB 6613 merely added "the Internet" to the non-exclusive, illustrative list of electronic communications media over which transmitting gambling information was always illegal. In doing so, the Legislature did nothing more than confirm the obvious: that RCW 9.46.240's proscription against knowing transmission or receipt of gambling information using "telephone, telegraph, radio, semaphore, **or similar means**" extended to the Internet. RCW 9.46.240 (2005) (emphasis added).

In any event, reference to the Final Bill Report, which serves as a clear statement of legislative intent, reveals that the Legislature explicitly added the Internet to RCW 9.46.240's illustrative list of communication media in order to forestall tribes from raising Internet gambling as topic for compact negotiations under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*, -- not to economically protect local gambling interests.[29] CP 368. *See Kadoranian v. Bellingham Police*

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make a pari-mutuel wager in another state, provided that such activity was also legal in the receiving state. To this end, 15 U.S.C. § 3001(a)(3) provides "in the limited area of interstate off-track wagering on race horses, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers." Because off-track betting is legal in Washington, (*see* RCW 67.16.200), horse racing fans in Washington, pursuant to the Interstate Horse Racing Act, can wager on off-track races taking place in another state, provided that state has also legalized off-track betting. Because Washington's Interstate off-track betting system is specifically allowed by federal law, it has no place in Rousso's dormant Commerce Clause analysis.

[29] The Final Bill Report for SB 6613 provides, in relevant part:

Dep't, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992) (Final Bill Report provides "express legislative intent" underlying a statute). IGRA provides that states that authorize gambling activities must engage in good faith compact negotiations regarding tribal gambling to the extent that the state authorizes gambling. Legislative history establishing that the Legislature adopted SSB 6613 to avoid tribal compact negotiations over Internet gambling belies Rousso's bald contention that SSB 6613 was intended to protect local gambling interests from out-of-state competition. It also belies any contention that the Legislature intended SSB 6613 to protect local tribal gambling interests in Washington State, as the Final Bill Report suggests just the opposite. It further demonstrates that tribal gambling activities within Washington are governed by a combination of federal law and state/tribal compacts and, therefore, have been effectively removed from analysis under the dormant Commerce Clause. *See* IGRA, 25 U.S.C. § 2701 *et seq.* (authorizing the execution of tribal/state compacts governing the regulation of tribal gambling).

Although he does not directly raise this issue in his brief, Rousso has also argued that RCW 9.46.240 operates to protect the Washington

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> Following the 1990 ruling in *Mashantucket Pequot Tribe v. Connecticut*, [913 F.2d 1024 (2d Cir. 1990)], courts interpreting the Indian Gaming Regulatory Act have consistently held that when requested by a tribe, a state must engage in compact negotiations regarding the conduct of a gambling activity unless, as a matter of criminal law and public policy, the activity is prohibited. CP 368.

State Lottery from interstate competition. As with horse-racing, however, the State Lottery is not subject to regulation under the Gambling Act. RCW 9.46.291. Also, and very significantly, a state that operates its own lottery is functioning as a market participant and as such, its actions are immune from challenge under the dormant Commerce Clause. *Chance Management, Inc. v. South Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996). *See Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980) (decision by state-owned cement plant to give in-state customers priority over out-of-state customers not subject dormant commerce clause analysis). Accordingly, the State Lottery is irrelevant to Rousso's analysis.

7. Less restrictive alternative analysis is not appropriate when no demonstrably viable alternative is available.

Rousso faults the trial court for failing to invalidate RCW 9.46.240 because the court failed to consider whether there were equally effective alternatives that would have less impact on interstate commerce. Rousso, however, fails to identify any alternative that would satisfy this requirement. *See* Aplt's Br. at 28-29. In his argument below, Rousso posited that licensing out-of-state or foreign Internet casinos to operate in Washington would be less intrusive. No such licensing system, however, currently exists in the United States and implementation of such a system

would be fraught with complicated jurisdictional issues, implicating both federal and international law. "The 'abstract possibility' of developing [a nondiscriminatory alternative], particularly when there is no assurance as to [its] effectiveness, does not make th[at] [alternative] an '[a]vailabl[e] . . . nondiscriminatory alternativ[e] . . . for purposes of the Commerce Clause." *Maine v. Taylor*, 477 U.S. 131, 147, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (upholding state law prohibiting importation of bait minnows from out-of-state sources even though law discriminated against interstate commerce). Absent any available and viable alternatives, consideration of less restrictive alternatives is futile and, therefore, inappropriate in this case.

Rousso's contention that Washington is attempting to impose its laws on the residents of other states or nations is equally unpersuasive. Enforcement of RCW 9.46.240 is necessarily limited by the United States Supreme Court's holding in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and Washington's criminal long arm statute, RCW 9A.04.030. Both federal and state courts have acknowledged the application of the jurisdictional principles of *International Shoe* to the Internet, holding that states may exercise personal jurisdiction over activity on the Internet if, but only if, a

sufficient nexus exists with the forum state. *See, e.g., Cybersell, Inc., v. Cybersell, Inc.*, 130 F.3d 414, 417-19 (9th Cir. 1997); *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 728 n. 6, 981 P.2d 454 (1999). Since Mr. Rousso lives, and accesses the Internet, in Washington, there can be no doubt of the State's authority to regulate his gambling activities. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510 (D.C. Cir. 2002) (rejecting the notion that "the borderless environment of cyberspace" lies outside physical jurisdiction).

Given the foregoing authorities and limitations, Rousso's assertions that SB 6613 impermissibly impairs the ability of individuals to engage in interstate commerce are without merit. Aplt's Br. at 27. *See Heckel,* 143 Wn.2d at 839 (finding that anti-spam law does not have "sweeping extraterritorial effect" that would overshadow local benefits). Similarly, Rousso's arguments regarding the impact of RCW 9.46.240 on international commerce are equally unpersuasive. Indeed, if anyone is attempting to thwart state or national sovereignty, it is Rousso, who, through his constitutional challenge, is attempting to impose foreign laws legalizing Internet gambling on the residents of Washington.

V. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court issue an Opinion upholding the Superior Court's decision granting summary judgment in favor of the State.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008.

ROBERT M. MCKENNA
Attorney General

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Appendix A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6613

Chapter 290, Laws of 2006

59th Legislature
2006 Regular Session

INTERNET GAMBLING

EFFECTIVE DATE: 6/7/06

Passed by the Senate February 14, 2006
YEAS 44 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House March 2, 2006
YEAS 93 NAYS 5

FRANK CHOPP

Speaker of the House of Representatives

Approved March 28, 2006.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6613** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

March 28, 2006 - 3:13 p.m.

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 6613

Passed Legislature - 2006 Regular Session

State of Washington 59th Legislature 2006 Regular Session

By Senate Committee on Labor, Commerce, Research & Development (originally sponsored by Senators Prentice, Keiser, Kline, Rasmussen and Shin)

READ FIRST TIME 02/03/06.

AN ACT Relating to reaffirming and clarifying the prohibition against internet and certain other interactive electronic or mechanical devices to engage in gambling; amending RCW 9.46.240 and 67.70.040; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** It is the policy of this state to prohibit all forms and means of gambling, except where carefully and specifically authorized and regulated. With the advent of the internet and other technologies and means of communication that were not contemplated when either the gambling act was enacted in 1973, or the lottery commission was created in 1982, it is appropriate for this legislature to reaffirm the policy prohibiting gambling that exploits such new technologies.

Sec. 2. RCW 9.46.240 and 1991 c 261 s 9 are each amended to read as follows:

Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, the internet, a telecommunications transmission system, or similar means, or knowingly

installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a ((~~gross misdemeanor~~)) class C felony subject to the penalty set forth in RCW 9A.20.021((~~: PROVIDED, HOWEVER, That~~)). However, this section shall not apply to such information transmitted or received or equipment installed or maintained relating to activities authorized by this chapter or to any act or acts in furtherance thereof when conducted in compliance with the provisions of this chapter and in accordance with the rules ((~~and regulations~~)) adopted ((~~pursuant thereto~~)) under this chapter.

Sec. 3. RCW 67.70.040 and 1994 c 218 s 4 are each amended to read as follows:

The commission shall have the power, and it shall be its duty:

(1) To ((~~promulgate such~~)) adopt rules governing the establishment and operation of a state lottery as it deems necessary and desirable in order that such a lottery be initiated at the earliest feasible and practicable time, and in order that such lottery produce the maximum amount of net revenues for the state consonant with the dignity of the state and the general welfare of the people. Such rules shall include, but shall not be limited to, the following:

(a) The type of lottery to be conducted which may include the selling of tickets or shares, but such tickets or shares may not be sold over the internet. The use of electronic or mechanical devices or video terminals which allow for individual play against such devices or terminals shall be prohibited. An affirmative vote of sixty percent of both houses of the legislature is required before offering any game allowing or requiring a player to become eligible for a prize or to otherwise play any portion of the game by interacting with any device or terminal involving digital, video, or other electronic representations of any game of chance, including scratch tickets, pull-tabs, bingo, poker or other cards, dice, roulette, keno, or slot machines. Approval of the legislature shall be required before entering any agreement with other state lotteries to conduct shared games;

(b) The price, or prices, of tickets or shares in the lottery;

(c) The numbers and sizes of the prizes on the winning tickets or shares;

(d) The manner of selecting the winning tickets or shares, except as limited by (a) of this subsection;

(e) The manner and time of payment of prizes to the holder of winning tickets or shares which, at the director's option, may be paid in lump sum amounts or installments over a period of years;

(f) The frequency of the drawings or selections of winning tickets or shares. Approval of the legislature is required before conducting any on-line game in which the drawing or selection of winning tickets occurs more frequently than once every twenty-four hours;

(g) Without limit as to number, the type or types of locations at which tickets or shares may be sold;

(h) The method to be used in selling tickets or shares, except as limited by (a) of this subsection;

(i) The licensing of agents to sell or distribute tickets or shares, except that a person under the age of eighteen shall not be licensed as an agent;

(j) The manner and amount of compensation, if any, to be paid licensed sales agents necessary to provide for the adequate availability of tickets or shares to prospective buyers and for the convenience of the public;

(k) The apportionment of the total revenues accruing from the sale of lottery tickets or shares and from all other sources among: (i) The payment of prizes to the holders of winning tickets or shares, which shall not be less than forty-five percent of the gross annual revenue from such lottery, (ii) transfers to the lottery administrative account created by RCW 67.70.260, and (iii) transfer to the state's general fund. Transfers to the state general fund shall be made in compliance with RCW 43.01.050;

(l) Such other matters necessary or desirable for the efficient and economical operation and administration of the lottery and for the convenience of the purchasers of tickets or shares and the holders of winning tickets or shares.

(2) To ensure that in each place authorized to sell lottery tickets or shares, on the back of the ticket or share, and in any advertising or promotion there shall be conspicuously displayed an estimate of the probability of purchasing a winning ticket.

(3) To amend, repeal, or supplement any such rules from time to time as it deems necessary or desirable.

(4) To advise and make recommendations to the director for the operation and administration of the lottery.

Passed by the Senate February 14, 2006.
Passed by the House March 2, 2006.
Approved by the Governor March 28, 2006.
Filed in Office of Secretary of State March 28, 2006.

NO. 61779-6

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

LEE H. ROUSSO, Appellant, v. STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

I certify that on December 3, 2008, I caused a true and correct copy of the Brief of Respondent in the above-referenced matter to be served upon the parties herein, as indicated below:

LEE ROUSSO
LAW OFFICES OF
HADLEY GREEN PLLC
901 S THIRD ST
RENTON WA 98057

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Express
☐ By Fax:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of December, 2008.

Nerissa Raymond
NERISSA RAYMOND
Legal Assistant

Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

December 3, 2008

Clerk of the Court
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

Re: **Rousso v. State of Washington**
Docket No. 61779-6

Dear Clerk of the Court:

Please find enclosed the original and one copy of the Brief of Respondent and Certificate of Service in the above-referenced matter.

Thank you for your assistance with this matter.

Sincerely,

Nerissa Raymond
NERISSA RAYMOND
Legal Assistant

:nr
Enclosures
cc: Lee Rousso, *pro se* petitioner and opposing counsel